

BEFORE THE UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103

IN THE MATTER OF:

Mr. William J. Fabrick
3225 Old Westminister Pike
Finksburg, Maryland 21048,

RESPONDENT

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EPA Docket No.
CWA-III-208

DEFAULT ORDER

This administrative proceeding for the assessment of a civil penalty was initiated by the Director of the Environmental Services Division, United States Environmental Protection Agency, Region III ("Complainant"), pursuant to Section 309(g) of the Clean Water Act (CWA), 33 U.S.C. § 1319(g)(2)(a), and the Proposed Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation, Termination or Suspension of Permits ("Proposed Consolidated Rules"), 63 *Fed. Reg.* 9464 (February 25, 1998). On March 25, 1998 Complainant filed an administrative complaint proposing to assess William J. Fabrick ("Respondent") a penalty of \$16,500 for his alleged violation of the Clean Water Act. No answer having been filed in over a year, Complainant filed a Motion for Default Order on July 21, 1999. On August 23, 1999, the Agency's final Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders and the Revocation,

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Termination or Suspension of Permits, 40 C.F.R. Part 22 [published at 64 *Fed. Reg.* 40138 (July 23, 1999)](“final Consolidated Rules”) became the governing rules in this proceeding. This ORDER grants the Complainant’s Motion for Default Order under the final Consolidated Rules.

The Default provisions of the proposed and final Consolidated Rules state that a party may be found to be in default, after motion, upon failure to file a timely answer to the complaint. Those provisions also provide that default by respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the complaint and a waiver of respondent’s right to contest such factual allegations. Proposed 40 C.F.R. § 22.17(a), 63 *Fed. Reg.* 9464, 9486 (February 25, 1998); 40 C.F.R. § 22.17(a), [published at 64 *Fed. Reg.* 40138, 40182 (July 23, 1999)].

Where the motion for default requests the assessment of a penalty against the defaulting party, the movant must specify the penalty and state the legal and factual grounds for the penalty requested. Proposed 40 C.F.R. § 22.17(b), 63 *Fed. Reg.* 9464, 9486 (February 25, 1998); 40 C.F.R. § 22.17(b), [published at 64 *Fed. Reg.* 40138, 40182 (July 23, 1999)].

The Default provisions go on to require that when the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party unless the record shows good cause why a default order should not be issued. The relief proposed in the complaint shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under the Consolidated Rules. Proposed 40 C.F.R. § 22.17(c), 63 *Fed. Reg.* 9464, 9486 (February 25, 1998); 40 C.F.R. § 22.17(c), [published at 64 *Fed. Reg.* 40138, 40182 (July 23, 1999)].

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent is a "person" within the meaning of Section 502(5) of the Act, 33 U.S.C. § 1362(5).
2. Property located adjacent to Pennsylvania Route 194, Germany Township, Adams County, Pennsylvania (identified and referred to as the "Site" on Exhibit A attached to the Complaint) contains wetlands which constitute "waters of the United States" within the meaning of Section 502(7) of the Act, 33 U.S.C. § 1362(7), and 33 C.F.R. § 323.2(a); 40 C.F.R. § 232.2, and 40 C.F.R. § 122.2.
3. Commencing in March, 1993 and continuing periodically through June, 1996, Respondent or persons acting on behalf of Respondent operated equipment which discharged fill material into wetlands on the Site.
4. Fill material constitutes a "pollutant" within the meaning of Section 502(6) of the Act, 33 U.S.C. § 1362(6) and 40 C.F.R. § 232.2.
5. The equipment referenced in Paragraph 11.3 constitutes a "point source" within the meaning of Section 502(14) of the Act, 33 U.S.C. § 1362(14).
6. Section 301 (a) of the Act, 33 U.S.C. § 1311 (a), prohibits the discharge of pollutants from point sources to waters of the United States except in compliance with, among others, a permit issued by the Secretary of the Army under Section 404 of the Act, 33 U.S.C. § 1344.
7. At no time during the discharge of pollutants to the waters of the United States described in Paragraph 2 did the Respondent have a permit from the Secretary of the Army as

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required by Section 404 of the Act, 33 U.S.C. § 1344.

8. Respondent, by discharging fill material to the waters of the United States without a permit, has violated Section 301(a) of the Act, 33 U.S.C. § 1311(a).

9. Under Section 309(g)(2)(A) of the Act, 33 U.S.C. § 1319(g)(2)(A), Respondent is liable for the administrative assessment of civil penalties in an amount not to exceed \$ 10,000 per day for each day the violation continues, up to a maximum of \$27,500.

10. Complainant has consulted with the Commonwealth of Pennsylvania regarding this proposed action as required by Section 309(g)(1)(A) of the Act, 33 U.S.C. § 1319(g)(1)(A), by mailing a copy of this document to the appropriate State official and offering an opportunity for the State to consult further with Complainant on this proposed penalty assessment.

11. As required by Section 309(g)(4) of the Clean Water Act, 33. U.S.C. § 1319(g)(4), and Proposed 40 C.F.R. § 22.45(b), 63 *Fed. Reg.* 9464, 9492 (February 25, 1998) Complainant has provided the public with notice of the proposed penalty order and with a reasonable opportunity to comment on the proposed issuance of the penalty order.

12. On March 25, 1998, Complainant issued a Complaint proposing to assess Respondent a penalty of \$16,500.00 for violation of Section 301 (a) of the Clean Water Act, 33 U.S.C. § 1311(a).

13. Complainant based the proposed penalty on the nature, circumstances, extent and gravity of the violation, Respondent's prior compliance history, the degree of culpability for the cited violations, and all other factors identified at Section 309(g)(3) of the Clean Water Act, 33 U.S.C. § 1319(g)(3).

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13. Complainant considered the following facts in proposing the penalty:

a. Mr. Fabrick knew of the existence of wetlands and the delineation of the wetlands on the Site from previous meetings with Mr. Frank Plewa of the United States Army Corps of Engineers.

b. Mr. Fabrick has been previously cited for an identical violation at this Site. On December 2, 1985 United States Army Corps of Engineers opened an enforcement case against Respondent. The enforcement case was closed on September 23, 1986 upon Respondent's completion of restoration work for the wetlands that had been damaged by Respondent's illegal filling of wetlands.

c. The activity constituting the violation in this instance encroached upon the wetlands that had been restored by Respondent in 1986.

d. Respondent ignored a Cease and Desist Order issued by EPA.

e. Respondent did not respond to any EPA or State orders to submit a mitigation plan.

f. Respondent has been uncooperative with federal and state authorities.

g. Respondent appears to be using the Site as a waste disposal area.

h . Federal officials observed tires, trash and other waste material being used to fill the area on the Site designated as wetlands.

i . The area of wetlands involved is approximately .3 5 of an acre.

j. Respondent has obtained little or no economic benefit from the activities that serve as the basis for the Administrative Complaint.

k. Respondent's ownership of a Maryland recycling business indicates Respondent has resources upon which he can draw in order to pay the proposed penalty.

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14. Respondent was personally served with the Complaint in this matter on August 14, 1998.

15. In the Complaint, Complainant informed Respondent of the procedures for filing an Answer to the Complaint, the required contents of an Answer, Respondent's right to request and procedures for requesting a hearing, and the consequences of failing to file a timely Answer to the Complaint, as set forth at Proposed 40 C.F.R. § 22.15, 63 *Fed. Reg.* 9464, 9485 (February 25, 1998).

16. Respondent failed to file a written Answer to the Complaint within thirty days of service of the Complaint, as required by Proposed 40 C.F.R. § 22.15(a), 63 *Fed. Reg.* 9464, 9485 (February 25, 1998). Respondent has still not responded to the administrative complaint in any way.

17. On July 21, 1999, Complainant filed the instant Motion for a Default Order against Respondent. In this Motion, Complainant stated that Respondent had failed to file a timely answer, as required by then-governing Proposed 40 C.F.R. § 22.15(a), 63 *Fed. Reg.* 9464, 9485 (February 25, 1998). Complainant also stated that consultation had been made with the Commonwealth of Pennsylvania as required by Section 309(g)(1)(A) of the CWA, 33 U.S.C. § 1319(g)(1)(A).

18. I find that a default has occurred; I find no good cause in the record showing why a default order should not be issued; and I find that the proposed penalty is not inconsistent with the record of the proceeding or with the Clean Water Act.

DISCUSSION OF PENALTY ASSESSMENT

Section 309(g)(3) of the Clean water Act, 33 U.S.C. § 1319(g)(3), requires the Agency to take into account the following factors in determining the amount of the penalty assessed under this subsection: the nature, circumstances, extent and gravity of the violation, and with

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respect to the violator, ability to pay, any prior history of such violations, the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require. The final Consolidated Rules require the Presiding Officer to explain in detail how the penalty assessed corresponds to any penalty criteria set forth in the Act. The Presiding Officer must also consider any civil penalty guidelines issued under the Act. 40 C.F.R. § 22.28(b).

Although the Agency has issued Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance¹ for use by Agency enforcement personnel in negotiation of settlements of cases similar to this case, there are no formal or informal civil penalty guidelines issued under the Clean Water Act applicable to this case. Accordingly, the following analysis explains how the penalty assessed corresponds to the criteria set forth in the Act:

The nature, circumstances, extent and gravity of the violation: The filling of this wetland area has obliterated and totally destroyed the small but valuable aquatic resource, removing it from its natural place in the environmental landscape in the area. The makeup of the fill includes trash, used tires and other waste materials, damaging the aesthetic quality of the area and posing an unknown threat of contamination. Although the area filled is approximately .35 of an acre, the filling has an indirect effect on the quality of the environment extending at least to the range of visibility of the fill. Respondent's defiant refilling of a once-restored wetland area should be considered as an element of the circumstances of the violation as well as a strong indication of

¹ *Final Clean Water Act Section 404 Civil Administrative Penalty Settlement Guidance and Appendices*, December 14, 1990, issued jointly by the then-Assistant Administrators for Water and Enforcement, LaJuana S. Wilcher and James M. Strock.

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culpability of Respondent's part. I consider this to be an extremely grave violation of the Clean Water Act.

Violator's ability to pay: The burden to raise and prove an inability to pay a penalty rests with the Respondent. With this record being devoid of any evidence to the contrary, the Respondent is deemed able to pay the maximum statutory penalty. 56 *Fed. Reg.* 29996, 30006 (July 1, 1991). Complainant's assertion in his motion, although unsubstantiated by documentary evidence in the record, that Respondent owns a recycling business in Maryland, combined with the aforementioned presumption, tends to support a finding that Respondent has the ability to pay the proposed penalty. In the absence of any evidence or assertion to the contrary, I find Respondent is able to pay the proposed penalty.

Violator's prior history of such violations: Complainant also asserts in his motion that Respondent was the subject of a United States Army Corps of Engineers enforcement action for an identical violation at the site involved in this matter in 1985. That matter was allegedly closed in 1986 after Respondent restored the site to the satisfaction of the Corps. In the absence of any evidence or assertions to the contrary, I find that Respondent does have a history of such violations, involving the same prohibited filling of wetlands at this very location.

Violator's degree of culpability: From Complainant's un rebutted assertions in the motion, it appears that Respondent clearly knew that what he was doing was in violation of Federal law. The repeat nature of Respondent's violation confirms this, and compounds his culpability. It also appears that Respondent was uncooperative with Federal officials trying to resolve the matter informally, and in fact defied an EPA order to cease and desist his filling activities. This defiance to Federal regulatory authorities denotes an extremely high level of culpability.

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Violator's economic benefit or savings (if any) resulting from the violation: Although

Complainant appears willing to concede that Respondent did not obtain any economic benefit or savings from the violation at issue, I conclude that Respondent saved the cost of legal disposal of the refuse deposited at the site. In the absence of any evidence of the extent of such savings, a "token or symbolic amount may be assessed." 56 *Fed. Reg.* 29996, 30006 (July 1, 1991).

Such other matters as justice may require: With as blatant and defiant a repeat violation as the one involved here, justice requires that the penalty serve as a real deterrent to the Respondent and to any similarly situated persons. However, by regulation, I am precluded from assessing a penalty higher than that proposed by the Complainant: "If the Respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing information exchange or the motion for default, whichever is less." 40 C.F.R. § 22.27(b), published at 64 *Fed. Reg.* 40138, 40186 (July 23, 1999).

ORDER

AND NOW, this 25th day of April 2000, under the authority of Section 309(g) of the Clean Water Act, 33 U.S.C. § 1319(g), and the Consolidated Rules, 40 C.F.R. § 22.17, **Respondent is found to be in default.**

THEREFORE, pursuant to 40 C.F.R. § 22.17, Respondent is hereby **ordered** to pay a civil penalty of Sixteen Thousand, Five Hundred Dollars (\$16,500.00). This penalty shall become due and payable, without further proceedings, sixty (60) days after this Default Order becomes final, pursuant to 40 C.F.R. § 22.17(a). Payment shall be made by forwarding a cashier's or certified check, payable to:

Treasurer, United States of America
U.S. EPA, Region III
P.O. Box 360515
Pittsburgh, Pennsylvania 15251

Respondent shall also send a copy of the check to:

Regional Hearing Clerk (3RCOO)
U.S. EPA, Region III
1650 Arch Street
Philadelphia, Pennsylvania 19103

This **Default Order constitutes** an Initial Decision, as provided in 40 C.F.R. § 22.17(b). This **Default Order shall become final** within forty-five (45) days after its service upon the parties and without further proceedings, unless (1) an appeal to the Environmental Appeals Board is taken from it by any party to the proceedings, or (2) the Environmental Appeals Board elects, *sua sponte*, to review the Initial Decision. The procedures for appealing an Initial Decision are listed in the Consolidated Rules at 40 C.F.R. § 22.30. A copy of the Consolidated Rules is attached.

INTEREST AND LATE PENALTY CHARGES

Additional charges will accrue if the civil penalty set forth below is not paid within sixty days of Respondent's receipt of this Default Order. The Federal Claims Collection Act, 31 U.S.C.

§ 3717, authorizes these charges. Interest will begin to accrue on this civil penalty if it is not paid within sixty days of Respondent's receipt of this order, as provided in 4 C.F.R. § 102.13(b).

Interest will be assessed at the rate of the United States Treasury tax and loan rate, as provided in 4 C.F.R. § 102.13(c). A penalty charge of six percent per year will be assessed on any portion of

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the debt that remains delinquent more than ninety days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due. 4 C.F.R. §102.13(e). Thus, to avoid the assessment of interest, Respondent must pay the civil penalty within sixty days of the receipt of this Order. To avoid the assessment of penalty charges on the debt, Respondent must pay the civil penalties within 150 days of receipt of this Order.

Date: April 25, 2000

/S/
BENJAMIN KALKSTEIN
Presiding Officer